UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 45

Docket No. SF-0752-12-0031-I-1

Tanuvasa J. Moe,

Appellant,

v.

Department of the Navy,

Agency.

June 14, 2013

Summerlyn Moe, Kapolei, Hawaii, for the appellant.

Ernest J. James, Esquire, and Jason Zhao, Pearl Harbor, Hawaii, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained his indefinite suspension for the period of September 24, 2011, to October 11, 2011. The agency has filed a cross-petition for review challenging the reversal of the indefinite suspension for the period of October 11, 2011, to November 4, 2011. For the reasons discussed below, we GRANT the appellant's

petition for review, DENY the agency's cross-petition for review, VACATE the initial decision, and REVERSE the indefinite suspension in its entirety.[1]

BACKGROUND

¶2 The appellant is employed as a Rigger Apprentice at a Navy shipyard. Initial Appeal File (IAF), Tab 4, Subtab 4CC. On Friday, June 3, 2011, the appellant was taken to a hospital after he had been behaving oddly while on duty, i.e., he was crying, walking in the rain talking to himself, and unresponsive when approached. *Id.*, Subtab 4AA. Medical personnel stabilized the appellant with psychotropic medication. *Id.*, Subtab 4F2. The following Monday, June 6, 2011, the appellant's personal psychiatrist, Dr. Joel Peck, cleared the appellant to return to work the following day without restrictions. *Id.*, Subtab 4N at 1. The appellant allegedly had one heated conversation with an agency nurse on June 6, 2011, regarding his return to work, *id.*, Subtab 4V, but he apparently had no further problems at work and performed his duties professionally upon his return to work on June 7, 2011. *See id.*, Subtab 4X.

¶3 On July 15, 2011, approximately 6 weeks after the June 3 incident, the agency ordered the appellant to report to the Naval Health Clinic on August 2, 2011, for a fitness for duty (FFD) psychiatric examination. IAF, Tab 4, Subtab 4Y. Dr. Patrick Lowry, the head of the clinic's occupational-medicine department met with the appellant on August 2, 2011. *Id.*, Subtab 4W. Dr. Lowry issued a report on August 10, 2011, in which he found that the appellant was not fit for duty, that he was likely a risk to himself or others, and that he should be evaluated by a mental-health professional. *Id.*, Subtabs 4U, 4W. Dr. Lowry's conclusion appears to have been based in part on the

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

appellant's failure to sign releases[2] that would have provided Dr. Lowry with access to his medical records. *Id*., Subtab 4W.

¶4 Upon receipt of Dr. Lowry's report, the agency placed the appellant on paid administrative leave, proposed to suspend him indefinitely, and ordered him to submit to a psychological evaluation by an independent psychologist, Dr. Gregory Turnbull. IAF, Tab 4, Subtabs 4P, 4S, 4T. Although the agency apparently believed that Dr. Turnbull's evaluation would be completed during the notice period for the proposed indefinite suspension, *id.*, Subtab 4Q at 1, the evaluation was not completed within that timeframe, and the appellant was indefinitely suspended on September 24, 2011, *id*., Subtab 4I. The appellant was advised that the suspension would remain in place until the Naval Health Clinic had received Dr. Turnbull's report and had determined whether the appellant was fit for duty. *Id*., Subtab 4H at 2. Subsequently, the agency amended its decision and allowed the appellant to use accrued leave and advanced sick leave during the period of the suspension so that he would continue to be paid while he was barred from work.[3] *Id*., Subtabs 4B1, 4E, 4G.

¶5 In a report dated October 11, 2011, Dr. Turnbull concluded that, although the appellant was not unconditionally fit for duty, he could return to work immediately if certain specified conditions were met. IAF, Tab 4, Subtab 4F2 at 2-3. The following week, Dr. Peck again cleared the appellant to return to work immediately. *Id*., Subtab 4E2. However, on a certification form dated October 25, 2011, Dr. Peck indicated that the appellant would be incapacitated

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[2] The appellant claimed below that he did not understand the release forms and he asked to have them explained to him. The appellant asserted that he did not refuse to sign the forms, but, because he did not understand the forms and they were never explained to him, he would not sign them. IAF, Tab 4, Subtab 4R, Tab 32 at 5.

[3] We note that the appellant's placement on accrued paid leave does not deprive the Board of jurisdiction over the suspension. *See LaMell v. Armed Forces Retirement Home*, 104 M.S.P.R. 413, ¶ 9 (2007).

until November 4, 2011, while he adjusted to a new treatment regimen. *Id*., Subtab 4C.

¶6 Dr. Lowry received Dr. Turnbull's report on October 11, agreed with its findings, and found the appellant fit for duty as of October 26, 2011,[4] provided the agency agreed to the accommodations proposed by Drs. Turnbull and Peck. *Id*., Subtab 4B2; IAF, Tab 28 at 9-12 (Lowry Declaration). Because Dr. Peck had certified that the appellant would be incapacitated through November 4, 2011, the agency ended his suspension and restored him to duty effective the next workday, November 7, 2011. IAF, Tab 4, Subtab 4A.

¶7 The appellant filed an appeal challenging the indefinite suspension. IAF, Tab 1. Because the appellant waived his right to a hearing, the administrative judge decided the case on the written record. IAF, Tab 33, Initial Decision (ID) at 4. The administrative judge found that the only issues raised were whether the agency properly imposed an indefinite suspension and, if it did, whether it should have ended that suspension sometime before November 7, 2011. *Id*. The administrative judge noted that the appellant did not raise any affirmative defenses. *Id*.

¶8 The administrative judge found that the Board had jurisdiction over the appeal because the agency had suspended the appellant for more than 14 days, despite the fact that the agency had allowed the appellant to use his accrued leave for the first portion of the suspension. ID at 5. The administrative judge found that the agency had adequate grounds to indefinitely suspend the appellant based on legitimate concerns that his medical condition made his continued presence in the workplace dangerous or inappropriate. *Id*. at 6-7. The administrative judge also found that the suspension had an ascertainable end, i.e., a determination that

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[4] The record indicates that the delay between Dr. Lowry's October 11 receipt of Dr. Turnbull's report and the issuance of his October 26 report finding the appellant fit for duty was caused by Dr. Lowry being on leave during this period of time. IAF, Tab 21 at 31-35.

the appellant was fit for duty. *Id*. at 7. The administrative judge found further that there was a nexus between the appellant's fitness for duty and the efficiency of the service. Finally, the administrative judge found the suspension reasonable. Thus, the administrative judge found that the agency met its burden of justifying the decision to impose an indefinite suspension. *Id.* at 8.

¶9 However, the administrative judge then determined that the appellant's suspension should have ended on October 11, 2011, the date that the agency received Dr. Turnbull's report, because it had all of the medical documentation it needed to return the appellant to work. *Id.* at 10. The administrative judge explicitly rejected the agency's argument that the appellant was voluntarily absent from work after October 11, 2011, finding that the appellant's decision to take sick leave was premised on the agency's representation that he was involuntarily suspended. *Id*. In addition, the administrative judge found that, even though Dr. Peck certified that the appellant was incapacitated and could not return until after November 4, Dr. Peck recanted that certification and implied that the appellant could have returned to work at any time. *Id.* at 13. Based on these findings, the administrative judge affirmed the suspension from the period of September 24, to October 11, 2011, and reversed the suspension for the period of October 11, to November 4, 2011. *Id*.

ANALYSIS

¶10 At the time the initial decision in this case was issued, the administrative judge did not have the benefit of the Board's decision in *Doe v. Pension Benefit Guaranty Corporation*, 117 M.S.P.R. 579 (2012). In *Doe*, the Board considered the scope of an agency's authority to order an employee to take a FFD examination. In deciding this issue, the Board considered the Office of Personnel Management's regulations set forth at 5 C.F.R. part 339, subpart C, which govern an agency's authority to require a medical examination. These regulations, which became effective February 10, 1984, amended the then-existing regulations in

5 C.F.R. parts 339, 432, 752, and 831. *Doe*, 117 M.S.P.R. 579, ¶ 25. The purpose of the revised regulations was to eliminate the potential for agency abuse of psychiatric FFD examinations by significantly limiting the authority of agencies to order medical examinations, including psychiatric examinations and examinations related to disability retirement. *Id*.

¶11 Under 5 C.F.R. § 339.301(b)-(d), an agency may order a medical examination only in the following limited circumstances: (1) an individual has applied for or occupies a position which has medical standards or physical requirements or which is part of an established medical evaluation program, 5 C.F.R. § 339.301(b); (2) an employee has applied for or is receiving continuation of pay and compensation as a result of an on-the-job injury or disease, 5 C.F.R. § 339.301(c); or (3) an employee is released from his or her competitive level in a reduction in force, and the position to which the employee has assignment rights has medical standards or specific physical requirements which are different from those required in the employee's current position, 5 C.F.R. § 339.301(d). *Doe*, 117 M.S.P.R. 579, ¶ 27. An agency may *offer*, rather than order, a medical examination (including a psychiatric evaluation) in any situation where the agency needs additional medical documentation to make an informed management decision, including situations where an individual has a performance or conduct problem which may require agency action. *Doe*, 117 M.S.P.R. 579, ¶ 27; 5 C.F.R. § 339.302.

¶12 Here, the agency asserted below that the appellant's position of Rigger Apprentice has medical standards or physical requirements. IAF, Tab 28 at 7. However, the only evidence submitted to substantiate the agency's claim is a 1969 United States Civil Service Commission Certificate of Medical Examination Form (Standard Form (SF) 78, Federal Personnel Manual (FPM) 339) which identified the relevant position on the form as "STUDENT TRAINEE, RIGGER WT-5210-00." IAF, Tab 4, Subtabs 4M at 2-4, 4Z. The SF 78 became obsolete when the FPM was abolished, and it was replaced with Optional Form (OF) 178

in December 2009. *See* http://www.gsa.gov/portal/forms/download/116482. The agency has not provided a current OF 178 to support its claim.

¶13 Moreover, the evidence submitted by the agency does not support a finding that the appellant's position of Rigger Apprentice ever had medical standards or physical requirements or that it is part of an established medical evaluation program. *See* 5 C.F.R. § 339.301(b). Rather, the SF 78 indicates only that the Student Trainee, Rigger position, in which the appellant was previously employed, may have (or had) medical standards or physical requirements. IAF, Tab 4, Subtabs 4M at 2-4, 4Z, 4EE. There is no SF 78 or similar document for the appellant's Rigger Apprentice position, to which the appellant was promoted effective April 10, 2011. IAF, Tab 4, Subtab 4CC. Therefore, the agency has failed to prove that the position the appellant occupied at the time he was ordered to undergo a FFD examination had medical standards or physical requirements or was part of an established medical evaluation program. Accordingly, if agency officials believed that they needed additional medical documentation in order to make an informed decision about the appellant's mental health and his ability to perform the duties of his position, the agency had the authority to offer the appellant a psychiatric evaluation pursuant to 5 C.F.R. § 339.302. The agency did not have the authority, however, to order the appellant to undergo such an examination. *See Doe*, 117 M.S.P.R. 579, ¶ 27.

¶14 Finally, with regard to the indefinite suspension, we have considered that, in *Doe*, the Board noted that both it and the United States Court of Appeals for Federal Circuit have long recognized that an agency can indefinitely suspend an employee, pending inquiry, for psychological or other medical reasons if the agency has a sufficient objective basis for doing so. *Pittman v. Merit Systems Protection Board*, 832 F.2d 598, 599-600 (Fed. Cir. 1997); *Doe*, 117 M.S.P.R. 579, ¶ 34 n.10; *Gonzalez v. Department of Homeland Security*, 114 M.S.P.R. 318, ¶ 13 (2010). Here, the record reflects that the appellant had received a medical release to return to work without restrictions from both the emergency

room doctor after treatment on June 3, 2011, and from his personal psychiatrist, Dr. Peck, on the following Monday, June 6, 2011. IAF, Tab 4, Subtab 4N at 1-2. The appellant returned to work on June 7, 2011, and there were no other incidents prior to the agency ordering him on July 15, 2011, to a psychiatric FFD examination on August 2, 2011, based on the June 3 incident. In fact, the appellant's supervisor provided a written statement on July 29, 2011, indicating that the appellant had performed fully successful work and worked well with others during this period of time. IAF, Tab 4, Subtab 4X. Thus, the record does not support a finding that the agency had a sufficient objective basis for indefinitely suspending the appellant, pending inquiry, for psychological testing. Accordingly, we reverse the indefinite suspension in its entirety.

ORDER

¶15 We ORDER the agency to cancel the suspension and to restore the appellant effective September 24, 2011. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶16 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶17 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the

actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶18 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶19 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You

must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of

particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification

of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.